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The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case

Cover Page Footnote

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THE MAGNUSON-MOSS WARRANTY ACT: MAKING CONSUMER PRODUCT WARRANTY A FEDERAL CASE

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FOR many Americans the most recent anniversary of the nation's independence was little more than a prelude to the forthcoming Bicentennial. For American businessmen, however, the 199th anniversary was significant in its own right. On July 4, 1975, the Magnuson-Moss Warranty Act¹ went into effect, having been signed by President Ford six months earlier.² A supporter has described the Act as "one of the most important pieces of consumer protection legislation considered by the Congress since the Federal Trade Commission Act itself was passed in 1914."³ This characterization should not be dismissed as mere partisan rhetoric. The Act may indeed have a significant effect upon the respective rights and responsibilities of those who buy, sell, and manufacture consumer products.

The Magnuson-Moss Warranty Act represents the first comprehensive attempt to deal with the problems of consumer product warranties on the federal level. This Article will examine the provisions of the Act, with particular emphasis on their interaction with existing state law.

I. BACKGROUND

On February 6, 1968, President Johnson created the Task Force on Appliance Warranties and Service.⁴ The Task Force was directed to undertake a study relating to the servicing, repair and durability of consumer products. Its report lent strong support to those who were pressing for new legislative initiatives in the area of consumer product warranties and revealed widespread consumer dissatisfaction with

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1. Title I of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (Title I codified at 15 U.S.C.A. §§ 2301-12 (Supp. 1, 1975)) [hereinafter cited as Warranty Act].

2. The Act is applicable to warranties on consumer products manufactured on or after July 4, 1975. It does not affect products manufactured prior to that date, regardless of the date of sale. Warranty Act § 112(a), 15 U.S.C.A. § 2312(a) (Supp. 1, 1975).

3. 120 Cong. Rec. 21,976 (daily ed. Dec. 18, 1974) (remarks of Senator Moss).

4. See H.R. Rep. No. 1107, 93d Cong., 2d Sess. 26-27 (1974) [hereinafter cited as House Report].

both the content and performance of warranty obligations.⁵ It concluded that some warrantors did not live up to their commitments, and that often no practical means of enforcement were available to aggrieved consumers. The Task Force found evidence that many warranties were inadequately understood by consumers, and that some were plainly deceptive. Concerning disclaimer of implied warranties, the report concluded that "[v]irtually all major appliance warranties contain provisions which purport to disclaim any liability which might arise by virtue of the implied warranties [of] merchantability and fitness for particular purposes under the Uniform Commercial Code."⁶ The report's suggestion that competitive pressures might dissuade individual companies from voluntarily conforming to higher warranty standards gave support to the argument that comprehensive legislation was required. Six years elapsed, however, before the Congress acted.

In attempting to correct the abuses enumerated by the President's Task Force, the Act relies on three distinct mechanisms. First, it establishes extensive warranty disclosure requirements which should aid the consumer in evaluating the worth of the proposed warranty prior to purchase, and insure the availability of an unambiguous listing of the obligations undertaken by the warrantor in the event that a dispute arises as to these responsibilities.⁷ Secondly, the Act creates a regulatory scheme directed at the actual content of written warranties. It sets forth minimum standards which must be met before a warranty may be designated a "full" warranty, and requires that all others be clearly labeled as "limited" warranties. It restricts a warrantor's ability to condition his obligations upon the buyer's use of specified support products,⁸ and severely curtails the right to limit or disclaim implied warranties.⁹ Finally, the Act establishes a system of formal and informal enforcement procedures and permits an aggrieved consumer to bring an action for violation of the Act in either federal or state court. In addition, both the Department of Justice and the Federal Trade Commission are involved in public enforcement.¹⁰

Each of these three facets of the Act (disclosure, content regulation and remedial procedures) will be examined in detail, together with the changes each has created in existing warranty law. Much of the latter

5. The President's Task Force Report on Appliance Warranties and Service, as quoted in House Report, *supra* note 4, at 26-28.

6. *Id.* at 28.

7. See notes 24-44 *infra* and accompanying text.

8. See note 88 *infra* and accompanying text.

9. See notes 45-88 *infra* and accompanying text.

10. See notes 90-120 *infra* and accompanying text.

law is contained in Article Two of the Uniform Commercial Code (UCC). Our objective will be an understanding of the rights and obligations created by the Act, and their interaction with those arising under the UCC. The intricate, sometimes convoluted manner in which the Warranty Act deals with existing state law makes the latter goal particularly elusive.

II. THE SCOPE OF THE ACT—SECTION 101

Before examining the specific requirements of the Magnuson-Moss Warranty Act, consideration should be given to its overall scope. The statute is directed at warrantors who offer written warranties in connection with the sale of consumer products. Significantly, oral warranties do not fall within the purview of the Act. Although consideration was given to the inclusion of oral warranties in some provisions of the bill, the statute as finally enacted excluded them entirely.¹¹

Section 101(6) provides the operative definition of "written warranty," and the result is far from satisfactory. A "written warranty" consists of a written statement concerning the quality or nature of the product, or the extent of the warrantor's obligations after sale. In either case the statement must become "part of the basis of the bargain."¹² By adopting the "basis of the bargain" formulation found in the definition of "express warranty" contained in UCC section 2-313, the draftsmen apparently intended that the test to be used in connection with this element of the definition be identical with that used under the Code. Having implicitly alluded to the UCC definition of express warranty, the question arises as to whether the federal definition in section 101(6) was meant to include all warranties that would be classified as written express warranties under Article Two. The UCC states that "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty . . ."¹³ The definition of "written warranty" in section 101(6), however, appears to introduce a new requirement. The affirmation or promise must also include a claim that the "material or workmanship is defect free or will meet a specified level of performance over a specified period of time."¹⁴ The purpose and effect of this additional language is unclear. A written claim by a

11. The Congress did imply that it might deal separately with such warranties if their use "became more prevalent." S. Rep. No. 1408, 93d Cong., 2d Sess. 26 (1974) [hereinafter cited as Senate Report].

12. Warranty Act § 101(6), 15 U.S.C.A. § 2301(6) (Supp. 1, 1975).

13. Uniform Commercial Code § 2-313(1)(a) [hereinafter cited as UCC].

14. Warranty Act § 101(6)(A), 15 U.S.C.A. § 2301(6)(A) (Supp. 1, 1975).

manufacturer of lawn furniture that the product is "rust free" would give rise to an express warranty under UCC section 2-313 if it became part of the basis of the bargain. Would it also fulfill the "defect free" requirement of section 101(6) and thus qualify as a "written warranty" under the Act? If the two definitions are meant to be coextensive, the additional language in section 101(6) is both extraneous and confusing. If the draftsmen intended to exclude some types of written warranties under the UCC, the dividing line is indistinct.

In order to come within the scope of the Act, the warranty must be given in connection with the sale of a "consumer product." Section 101(1) defines such a product as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes."¹⁵ The "distributed in commerce" requirement is obviously intended to bring the Act within the commerce clause of the United States Constitution and the inclusion of subsections 101(13) and (14) indicates that Congress intended this language to be construed broadly. It will be a rare warrantor who can avoid the jurisdiction of the Act. The question of whether a particular product is "normally used" for the purposes specified in section 101(1) is to be answered in light of the nature of the product itself, independent of its actual use by the individual consumer: the House report on the bill indicates that products which are in fact used for business purposes nonetheless fall within section 101(1) if such items would generally be used for personal, family, or household purposes.¹⁶ Thus an automobile used in the operation of a business is still a "consumer product" within the meaning of the Act.

Two other terms deserve mention before beginning an examination of the obligations imposed by the Act. Although many of the statute's provisions are directed at "warrantors," some (most notably sections 104(e) and 108) employ the term "supplier." A "supplier" is defined as "any person engaged in the business of making a consumer product directly or indirectly available to consumers."¹⁷ The House report states that the definition includes "all persons in the chain of production and distribution of a consumer product including the producer or manufacturer, component supplier, wholesaler, distributor, and re-

15. *Id.* § 101(1), 15 U.S.C.A. § 2301(1) (Supp. 1, 1975).

16. House Report, *supra* note 4, at 34. This approach is contrary to that taken by UCC § 9-109. Comment 2 to the latter section makes it clear that the principal use to which the product is put is determinative. UCC § 2-103(3) adopts the definition for purposes of Article 2 as well.

17. Warranty Act § 101(4), 15 U.S.C.A. § 2301(4) (Supp. 1, 1975).

tailer.”¹⁸ Persons not regularly engaged in making such products available to consumers are not to be considered “suppliers.” The original House version of the bill provided that only a “supplier” could be considered a “warrantor” under the Act.¹⁹ Before passage, however, the definition of “warrantor” was expanded in an effort to include third parties who sometimes give warranties on consumer products, such as certain magazines.²⁰ The Act now defines a “warrantor” as “any supplier or other person who gives . . . a written warranty or who is or may be obligated under an implied warranty.”²¹ Until the definition of “warrantor” was amended, it made little difference whether a particular provision used the term “warrantor,” or referred instead to a “supplier” who gives a written warranty. Now, however, an argument can be made that those provisions dealing with “suppliers” who give written warranties have a narrower application than those directed simply at “warrantors.” The latter provisions would cover third party warrantors while the former would not. Quite possibly this disparity in scope was unintended. Even under the expanded definition of “warrantor,” however, one who merely publishes or broadcasts a warranty on behalf of another should not be treated as having given or offered a written warranty.²² Only those third parties who actually undertake warranty obligations themselves should be included within the section 101(5) definition.

The term “warrantor” as defined in section 101(5) encompasses any person liable under an implied warranty, even where no written warranty has been offered. By virtue of section 101(7), it is state law, as modified by sections 104(a) and 108, that determines the existence of implied warranties. The creation of such warranties is thus governed by UCC section 2-314 (implied warranty of merchantability) and UCC section 2-315 (implied warranty of fitness). An implied warranty of merchantability will arise only where the seller is a “merchant.” The typical consumer products retailer, however, will fall within the UCC definition of “merchant” as set forth in section 2-104. An implied warranty of fitness will arise whenever the seller has reason to know that the goods are intended for a particular purpose if he is also aware that the customer “is relying on the seller’s skill or judgment to select or furnish suitable goods.”²³ Both UCC provisions provide for the exclusion or modification of these implied warranties, but sections 104(a) and 108 of the Act severely restrict such practices.

18. House Report, *supra* note 4, at 35.

19. *Id.* at 2.

20. Senate Report, *supra* note 11, at 27.

21. Warranty Act § 101(5), 15 U.S.C.A. § 2301(5) (Supp. 1, 1975) (emphasis added).

22. Senate Report, *supra* note 11, at 27.

23. UCC § 2-315.

III. THE DISCLOSURE PROVISIONS— SECTIONS 102, 106, 109(b) AND 111(c)

The importance of adequate disclosure in connection with the use of written warranties is readily apparent. If the consumer is not fully aware of the terms and conditions of the warranty, he will be unable intelligently to assess its value at the time of purchase. If the buyer does not understand his own duties and obligations, or is unaware of the proper enforcement procedures, warranty benefits which have been paid for as part of the purchase price may well be lost. The disclosure requirements are found chiefly in section 102, which requires that warrantors who choose to offer written warranties on consumer products "shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty."²⁴ The Federal Trade Commission (FTC) is to establish rules regulating the content of the necessary disclosures²⁵ and section 102(a) lists an assortment of items which may be incorporated in such rules. The language of the Act, however, permits the FTC to omit any of the listed items and to require the disclosure of additional information.²⁶ Several of the items enumerated in section 102(a) deserve special mention. The identity of the parties to whom the warranty extends must be disclosed,²⁷ and a warrantor offering a "full" warranty is unable to limit substantially the class of people to which the warranty extends.²⁸ The various enforcement mechanisms available to the consumer must also be disclosed.²⁹ The remaining provisions in section 102(a) contain few surprises. The importance of such information has already been recognized by the FTC

24. Warranty Act § 102(a), 15 U.S.C.A. § 2302(a) (Supp. 1, 1975).

25. The FTC has previously dealt with warranty disclosure under Federal Trade Commission Act § 5, 15 U.S.C.A. § 45 (Supp. 1, 1975). See, e.g., *Clinton Watch Co. v. FTC*, 291 F.2d 838 (7th Cir. 1961), cert. denied, 368 U.S. 952 (1962); *Parker Pen Co. v. FTC*, 159 F.2d 509 (7th Cir. 1946).

26. The Commission's Proposed Rule on Warranty Disclosures would require that all modifications or limitations of implied warranties and all exclusions or limitations on damages be disclosed in large type, capital letters, or underlined. If any such modification, limitation or exclusion is unenforceable under state law, this fact must be disclosed together with a list of non-enforcing jurisdictions. The rule would also require that the warranty contain a statement informing the consumer of the existence of implied warranties and of the possibility of court action to enforce his various legal rights. In addition, if a "lifetime" warranty is offered, a clear disclosure of the "life" referred to would be required; if the warrantor employs "owner registration cards," their use and purpose must also be disclosed in the warranty. 40 Fed. Reg. 29,892-93 (July 16, 1975).

27. Warranty Act § 102(a)(2), 15 U.S.C.A. § 2302(a)(2) (Supp. 1, 1975).

28. *Id.* § 104(b)(4), 15 U.S.C.A. § 2304(b)(4) (Supp. 1, 1975). See notes 76-79 *infra* and accompanying text. In addition, UCC § 2-318 restricts a warrantor's right to limit the extent of his liability with respect to injury to the person.

29. Warranty Act § 102(a)(8)-(9), 15 U.S.C.A. § 2302(a)(8)-(9) (Supp. 1, 1975).

in its *Guides Against Deceptive Advertising of Guarantees*.³⁰ In addition, section 102(b)(1)(B) permits, but does not compel, the FTC to prescribe the manner and form in which the required information is to be presented.

Section 102 also requires the FTC to prescribe rules which will insure that the terms of a written warranty are made available to the prospective buyer prior to sale. Previously it was not uncommon for manufacturers to enclose the warranty within the product packaging. The buyer might be told that the product was "guaranteed," but he would not have an opportunity to examine the actual language of the warranty until after he had arrived home with his purchase. Such a practice obviously makes it impossible for the consumer to "shop around" and compare the warranties being offered by different retailers or manufacturers. To make matters worse, the enclosed warranty might contain language purporting to limit or disclaim the implied warranties which may have arisen at the time of sale. Under the UCC such post-sale limitations or disclaimers would generally be ineffective.³¹ Having been made after the sale has been completed, they would be viewed as contract modifications, which require the agreement of both parties.³² If the contract for sale is within the Statute of Frauds, a writing would also be required to effectuate such a modification.³³ Some warrantors, however, employ a particularly deplorable method of surmounting these hurdles. The product is accompanied by a warranty registration card which, in addition to the disclaimers, contains a request that the buyer sign and return the card to the warrantor in order to obtain the benefits flowing from the written warranty. The buyer may well believe that he will have no rights whatever if he does not comply with the request. The signature is then used as evidence of acquiescence to the modification or disclaimer. Whenever a written warranty is given, section 108 prohibits the modification or disclaimer of implied warranties, even when attempted prior to purchase.³⁴ In some instances, however, the duration of implied warranties may still be limited and the warrantor may limit or exclude his liability for consequential damages arising from breach of such warranties. Section 102(b)(1)(A), however, requires that the terms of the

30. 16 C.F.R. § 239 (1974).

31. See, e.g., *Zabriskie Chevrolet, Inc. v. Smith*, 99 N.J. Super. 441, 240 A.2d 195 (L. Div. 1968) (disclaimer contained in warranty delivered after contract for purchase was signed held inoperative); *Ford Motor Co. v. Taylor*, 60 Tenn. App. 271, 446 S.W.2d 521 (1969) (written warranty containing disclaimer delivered subsequent to sale held not to exclude or modify implied warranty of merchantability).

32. UCC § 2-209. See J. White & R. Summers, *Uniform Commercial Code* 363 (1972).

33. UCC § 2-209(3).

34. See notes 81-86 *infra* and accompanying text.

warranty be disclosed to the consumer before sale. Apparently, therefore, a warrantor is prohibited from imposing even these limitations on implied warranties by means of language contained in a warranty or warranty registration card which is not available for inspection prior to purchase.³⁵

Section 102(b)(2) emphasizes an important limitation in the approach taken by the Act. No manufacturer or retailer is compelled to give a written warranty in connection with the sale of any consumer product. The Act regulates only the form and effect of those warranties which manufacturers and retailers choose to offer. As a result there may be a real danger that businessmen, wary of the more stringent standards contained in the Act, will actually reduce the number of written warranties they furnish to consumers. Both Congress and the FTC, however, apparently believe that competitive pressures will force most manufacturers and retailers to improve rather than curtail their warranty coverage.³⁶ This view may be overly optimistic. The continued existence of the abuses which ultimately prompted congressional action may well indicate that competitive forces are not particularly active in this aspect of retail marketing. Only time will reveal whether the restrictions created by the Act will induce a significant number of manufacturers and retailers to abandon their use of written warranties.³⁷

Section 102(d) permits the FTC to draft substantive provisions which warrantors may incorporate by reference in their written warranties. This authority, however, may undercut one of the principal benefits yielded by the comprehensive disclosure provisions. If the obligations of both parties are clearly delineated at the time of sale, later disagreements as to their respective responsibilities may be greatly reduced. For this purpose it makes little difference whether the

35. The Commission's Proposed Rule on Pre-Sale Availability of Written Warranty Terms would require the seller to make available a binder containing the warranties on all warranted products. The Proposed Rule on Warranty Disclosures would compel the disclosure in such warranties of all limitations on implied warranties. In addition, the latter rule specifically deals with warranty registration cards, stating that a warrantor who uses such cards as a condition precedent to warranty coverage must disclose that fact in the warranty itself. 40 Fed. Reg. 29,892-95 (July 16, 1975).

36. See 120 Cong. Rec. 21,977 (daily ed. Dec. 18, 1974) (remarks of Senator Magnuson); BNA Antitrust & Trade Reg. Rep. No. 699, at A-1 (Feb. 4, 1975) (remarks of Christopher S. White, Assistant to the Director, FTC Bureau of Consumer Protection).

37. The Association of Home Appliance Manufacturers has indicated that some of its member companies are indeed considering terminating their use of written warranties. The Association has reportedly told the FTC that it will cost "hundreds of millions of dollars, or perhaps billions" to make changes in the inventory, advertising, catalogs and point-of-sale materials necessary for compliance with the Act. BNA Antitrust & Trade Reg. Rep. No. 717, at A-7 to A-8 (June 10, 1975).

terms of the agreement explicitly appear in the warranty itself, or are simply alluded to by a reference to a government publication. But pre-sale disclosure serves the additional function of assisting the potential buyer in assessing the value of the proposed warranty. Viewed in this light, incorporation by reference may be counterproductive since the "canned" provisions may not be readily available to the consumer at the time and place the decision to purchase must be made. Such references will be of little help in any serious attempt to evaluate the quality of the warranty protection being offered. The buyer can properly assess only those provisions actually appearing on the face of the warranty. Since the FTC is not required to draft such "canned" provisions, their use should be carefully restricted. Fortunately, the Commission appears to be aware of the potential for abuse.³⁸

Finally, section 102(e) limits the application of the entire section to warranties on consumer products "actually costing" more than five dollars. The term "actually costing" is not defined in the Act, but the legislative history indicates that the phrase is meant to exclude all sales taxes. Thus the warranty on a product costing \$4.98 would not be covered by the disclosure requirements of section 102 even if the imposition of a sales tax raised the consumer's bill to more than five dollars.³⁹

The draftsmen of the Act recognized that service contracts are often used as substitutes for written warranties. As a result, section 106 subjects such contracts to similar disclosure requirements. The regulatory authority given to the FTC in connection with service contracts is intended to be coextensive with its corresponding authority over written warranties.⁴⁰

The Act gives particular attention to warranties offered in connection with the sale of used motor vehicles. Such warranties, of course, are subject to the general regulatory provisions of the Act. The Commission is also authorized by section 109(b) to supplement that protection by means of rules specifically aimed at used car warranties. Although the FTC may not require that a written warranty be given when a used car is offered for sale, the commission is permitted to require that

38. BNA Antitrust & Trade Reg. Rep. No. 699 at A-2 (Feb. 4, 1975).

39. House Report, *supra* note 4, at 36. The FTC has indicated it will interpret the five dollar minimum to include "multiple packaged items" costing more than five dollars, even if the items might individually sell for less than that amount, if they are in fact packaged in a manner that does not permit such individual sale. 40 Fed. Reg. 25,722 (June 18, 1975).

It should be emphasized that section 102 does not distinguish between "full" and "limited" warranties, as those terms are used in section 103. The section applies to all written warranties on consumer products costing more than five dollars regardless of their section 103 designations.

40. House Report, *supra* note 4, at 39.

the absence of a warranty be clearly disclosed to the consumer.⁴¹ This authority goes beyond that given with respect to other products. The general power to regulate disclosure granted in section 102(a) pertains only to the terms and conditions of written warranties. Therefore, the latter section probably does not permit the FTC to require that the absence of such a warranty on other products be disclosed.

The requirements set forth in section 102 are meant to preempt differing state disclosure regulations: such regulations are inapplicable to warranties covered by the Act.⁴² The purpose of section 111(c) is revealed in the Senate Commerce Committee Report on the Act:

States would be preempted from requiring labeling or disclosure requirements that differed from those prescribed pursuant to title I of this bill. This was designed to insure that suppliers of consumer products would not have to print warranties in conformance with the many possible State and Territorial disclosure formulas or labeling procedures.⁴³

Section 111(c)(2) allows the FTC to permit differing state disclosure requirements only when it determines that such requirements increase the protection afforded the consumer and do not unduly burden interstate commerce. Unfortunately, like so many of the Act's provisions, section 111(c) is not without its ambiguities. The subsection is introduced by the phrase "[e]xcept as provided in subsection (b)." The provisions of subsection (c) are thus subordinate to those of the prior subsection. The resulting interaction is obscure at best. Section 111(b)(1) purports to preserve all rights and remedies of consumers under state or other federal law. Section 111(b)(2) provides that, with the exception of sections 108, 104(a)(2) and (4), the Act does not affect liability for personal injury or state laws pertaining to consequential damages. It is not clear whether the reference in subsection (c) was meant to include both paragraphs of subsection (b). Considering section 111(b)(2) together with subsection (c), it would appear that state disclosure or labeling requirements which are directed at questions of liability for personal injury or consequential damages are not preempted by section 111(c). If this were not so, subsection (c) would have precisely the effect which paragraph (b)(2) attempts to avoid. But if state requirements directed at liability for personal injury or consequential damages are not preempted by federal regulations, the purpose of subsection (c) is undercut.⁴⁴ Thus, the wording of other

41. Warranty Act § 109(b), 15 U.S.C.A. § 2309(b) (Supp. 1, 1975).

42. *Id.* § 111(c)(1)-(2), 15 U.S.C.A. § 2311(c)(1)-(2) (Supp. 1, 1975).

43. S. Rep. No. 151, 93d Cong., 1st Sess. 25 (1973).

44. It is also difficult to reconcile subsection (c) with section 111(b)(1). That provision preserves the consumer's rights and remedies under state law. Thus if state law permits a consumer to recover damages caused by the failure of a warrantor to meet a state disclosure or

parts of the Act creates the implication that section 111(c) is narrower in scope than the Senate Commerce Committee Report would indicate.

IV. SUBSTANTIVE REGULATION OF WRITTEN WARRANTIES— SECTIONS 102(c), 103, 104, 105, 107 AND 108

The disclosure requirements of the Magnuson-Moss Warranty Act represent only one aspect of its overall regulatory scheme. Of greater significance are the provisions governing the substantive content of written warranties. At the core of this phase of the Act is the mandatory designation of written warranties as either a "full (statement of duration) warranty" or a "limited warranty."⁴⁵ A warranty failing to meet federal minimum standards must be conspicuously designated as a "limited warranty."⁴⁶ All warranties falling within the scope of section 103 must carry one of these two designations. Although warrantors are not obligated to offer "full" warranties, it is the hope of the Act's sponsors that competitive pressure will induce an increasing number to provide such warranties.⁴⁷ It is impossible to foretell the outcome of such a strategy. Manufacturers and retailers will surely be aware of the negative psychological impact associated with the term "limited warranty." Not only will potential buyers be alerted to possible shortcomings in the warranty itself, but they may also infer that the warrantor's reluctance to offer more complete protection betrays his own lack of confidence in the performance of his product. On the other hand, as noted earlier, the continued existence of many of the problems which served to give rise to the Act suggests that warranty practices are often well insulated from competitive forces.

labeling requirement, paragraph (b)(1) would appear to exempt such a requirement from the preemptive effect of section 111(c). If such a disclosure or labeling requirement was rendered inapplicable by subsection (c), the result would seemingly be to "invalidate or restrict" a "right or remedy" established by state law, in violation of section 111(b)(1). As a result, state disclosure or labeling requirements which give rise to corresponding private rights or remedies in the consumer may be unaffected by section 111(c). If the reference in section 111(c) includes both paragraphs of subsection (b), the only state disclosure or labeling requirements which are preempted by subsection (c) may be those which are not directed at liability for personal injury or consequential damages and which do not create private rights or remedies in the consumer.

45. Warranty Act § 103(a), 15 U.S.C.A. § 2303(a) (Supp. 1, 1975).

46. The FTC has stated that it will interpret the language of section 103(a) as requiring that the designation be in the form of a caption or title, clearly separated from the text of the warranty. 40 Fed. Reg. 25,722 (June 18, 1975). In addition, the Proposed Rule on Pre-Sale Availability of Written Warranty Terms would require that the designation (together with a statement informing the consumer that a copy of the warranty is available from the retailer) be clearly and conspicuously displayed on both the product itself and the product container, packaging or carton. *Id.* at 29,894 (July 16, 1975).

47. 120 Cong. Rec. 21,977 (daily ed. Dec. 18, 1974) (remarks of Senator Magnuson).

Section 103(b) exempts "expressions of general policy concerning customer satisfaction" from both the disclosure and designation requirements. The intention is to exclude such statements as "satisfaction guaranteed or your money refunded."⁴⁸ This exemption is not available, however, if the general policy is subject to any limitations. If, for example, the offer to refund is limited in duration or requires some action on the part of the consumer as a condition precedent, subsection (b) would not be applicable.⁴⁹ Presumably, even those statements which are excluded under section 103(b) remain subject to regulation under the Federal Trade Commission Act, and in particular under the FTC guidelines dealing with such representations.⁵⁰ In addition to the subsection (b) exemptions, the Commission is granted authority to exempt other written warranties from the designation requirements of section 103(a) by virtue of subsection (c).

Subsection (d) provides that the designation requirements of section 103 apply only to warranties on consumer products "actually costing" more than ten dollars.⁵¹ Warranties on products priced between five and ten dollars are thus subject to the disclosure regulations while exempt from the designation provisions of section 103. Subsection (d) also contains one of the linguistic enigmas with which the Act seems to abound. It limits the application of section 103(a) and (c) to warranties which "are not designated 'full (statement of duration) warranties,'" ⁵² so that those subsections are not applicable to warranties which are already so designated.⁵³ Obviously, section 103(c) would be inapplicable, since

48. House Report, *supra* note 4, at 37.

49. The FTC has indicated that it will not consider policy statements applying to some, but not all, of the consumer products manufactured by a single supplier as being expressions of "general policy" within the meaning of section 103(b). It has also stated that the word "guarantee" rather than the word "warranty" is the appropriate term for use in expressions of policy. 40 Fed. Reg. 25,722 (June 18, 1975).

50. Warranty Act § 111(a)(1), 15 U.S.C.A. § 2311(a)(1) (Supp. 1, 1975). The FTC Guides Against Deceptive Advertising of Guarantees, 16 C.F.R. § 239 (1974), construe such general representations as a "guarantee that the full purchase price will be refunded at the option of the purchaser." *Id.* § 239.3(a). Any conditions or limitations on such a guarantee must be clearly and conspicuously disclosed. *Id.* § 239.1. Since general expressions of policy are not subject to the section 102 disclosure provisions, the FTC Guides are not superseded with respect to such guarantees by the new rules being promulgated under that section. See 40 Fed. Reg. 25,724 (June 18, 1975). The enforcement procedures of section 110 of the Act may also be applicable to such representations. *Id.* at 25,722.

51. Again, the term "actually costing" refers to the purchase price before the imposition of sales taxes. The ten dollar minimum should be compared with the five dollar minimum established in section 102(e) for purposes of that section's disclosure requirements. The FTC has indicated that it will interpret the ten dollar minimum as it has the five dollar minimum in section 102, to include "multiple packaged items." See note 39 *supra*.

52. Warranty Act § 103(d), 15 U.S.C.A. § 2303(d) (Supp. 1, 1975).

53. These subsections are not made inapplicable to warranties designated as "limited."

that section merely permits the FTC to exempt certain warranties from carrying any designation at all. But subsection (a) is also rendered inapplicable to warranties designated as "full." Thus such warranties need not comply with section 103(a)(1), which permits the use of the term "full" only when the warranty meets the minimum standards set out in section 104. This rather bizarre result, however, must be considered in conjunction with section 104(e), which states that if a supplier⁵⁴ designates a warranty as "full," it shall be deemed to incorporate the minimum requirements of section 104. Therefore, although section 103(d) appears to permit the designation of warranties as "full" even when they do not meet the minimum section 104 standards, such standards will be implied by law in any warranty so designated.

Since section 104(e) does not contain the ten dollar limitation found in section 103(d), warranties on consumer products costing less than that amount, but which are designated as "full," will be held to incorporate the minimum standards.⁵⁵ The warrantors of such products are not compelled to make any designation whatsoever by virtue of section 103(d), but if they voluntarily choose to take advantage of the merchandising value of the "full" designation they will be held to the minimum standards. In order to avoid inadvertently being swept up by section 104(e), manufacturers and retailers who do not wish to meet the section 104 standards should insure that the words "full warranty" do not appear on packaging or advertising.⁵⁶

It should be noted that section 103 does not require that a "full" warranty be applicable to the entire product. Section 105 permits a warrantor to offer a "full" warranty covering only a portion of the product while offering a "limited" warranty on the remainder, provided the two are clearly differentiated. Section 103 would then require that both warranties be properly designated.⁵⁷ Section 105 specifically deals only with the case where "full" and "limited" warranties are given on the same product. Presumably a warrantor may offer a "full" warranty on one portion of the product while giving no

Subsection (a) would therefore apply, and the mandatory language in paragraph (a)(1) would presumably require that the designation be changed to "full" if in fact the warranty meets the minimum standards of section 104.

54. The distinction between the terms "warrantor" and "supplier" has been discussed in connection with section 101. See text accompanying notes 17-23 *supra*.

55. The House-Senate conferees clearly intended this result, although they may possibly have believed that section 103(d), rather than section 104(e), carried out their intent. See Senate Report, *supra* note 11, at 24.

56. Presumably such terms as "fully warranted" or "fully guaranteed," appearing on products costing less than ten dollars (and therefore not committed to the use of the official language of section 103(a)) would likewise trigger the operation of section 104(e).

57. See House Report, *supra* note 4, at 39.

written warranty of any kind on the remainder. Section 102(a)(3) clearly anticipates the existence of warranties which extend to only specific parts of the products. Section 102, of course, would require that the reduced scope of the warranty be adequately disclosed.

Section 104(a) sets forth the minimum standards applicable to "full" warranties.⁵⁸ Under paragraph (a)(1), the warrantor must "remedy" the consumer product within a reasonable time and without charge. An obligation to remedy may arise because of either a defect in the product itself, or because of a failure to conform to the written warranty. The term "remedy" is defined in section 101(10). It can consist of repair, replacement or refund, at the option of the warrantor, except that a refund may be given only with the consent of the consumer or when replacement cannot be made and repair is impractical. Unhappily, the Act does not specify the precise time at which the consumer must evidence his willingness to accept a refund. It might be argued that the seller may extract such consent at the time of sale. The language of section 101(10), however, appears to allow the consumer to retain his right to accept or reject the refund until such time as the necessity for remedy actually arises. Under this interpretation, section 104(a)(1) would preclude a warrantor from limiting the buyer's remedy to a refund of the purchase price when a "full" warranty has been given.⁵⁹ The section 101(12) definition of "refund" allows a warrantor to deduct reasonable depreciation only where permitted by FTC rules. Until such rules are promulgated, the warrantor may not make any such deductions.⁶⁰ The "replacement" remedy, as defined in section 101(11), may be accomplished by furnishing either an "identical" or "reasonably equivalent" product.

The duties set forth in section 104(a)(1) must be read in connection with those in section 104(a)(4). This latter provision is directed at those consumer products which outwardly resemble toasters, televisions or automobiles, but are in reality "lemons." If a product remains defective, or does not conform to the warranty after a "reasonable number of attempts" to repair it, the warrantor must allow the consumer to choose either replacement without charge or refund.⁶¹ Thus the consumer is not obligated to permit an unlimited number of repair attempts. A warrantor offering a "full" warranty cannot limit the remedy to repair or replacement as permitted by UCC section

58. Section 104(b)(3) authorizes the FTC to define the standards in more detail, and to deal with their application to particular products.

59. UCC § 2-719 would ordinarily permit such a limitation.

60. Senate Report, *supra* note 11, at 23.

61. Normally, the warrantor has the option of choosing repair, replacement or (with the consent of the consumer) refund. See text accompanying note 58 *supra*.

2-719, since the consumer has the right to demand a refund if the product proves unrepairable.⁶² The FTC is given authority to specify by rule what constitutes a "reasonable number" of repair attempts under various circumstances.⁶³

Sections 104(b)(1) and (b)(2) shed light on the nature of the remedial duties imposed by sections 104(a)(1) and (a)(4). These provisions carefully limit the obligations which the warrantor may properly place upon the consumer. The warrantor may, of course, demand that the consumer give notice of the defect or nonconformity. Presumably the "reasonable time" within which the warrantor must remedy the product under paragraph (a)(1) is measured from the time of such notification.⁶⁴ Aside from the duty to give notice, all obligations imposed on the consumer are subject to the reasonableness standard established by section 104(b)(1). It is not clear, however, whether the warrantor's unconditional right to require notification includes the right to specify the time and form of such notice.⁶⁵ Such requirements should probably be treated in the same manner as are other potential consumer obligations under section 104(b)(1), and thus be subject to the reasonableness test contained in that provision. The reasonableness of the duties imposed upon the consumer may be contested in a variety of settings. The Commission may also seek to enjoin the imposition of the requirement under sections 110(b) and (c)(1). The fact that the Commission has not promulgated a rule dealing with the type of obligation in question would not prohibit the warrantor from attempting to impose it.⁶⁶ The requirement could then be tested in an action for breach of warranty, but the burden would be on the warrantor to establish the reasonableness of the proposed obligation.⁶⁷

The warrantor may also require that the product be "made available" to him "free and clear of liens and other encumbrances."⁶⁸ The House Commerce Committee evidently believed that the "made available" language would permit the warrantor to demand that the con-

62. Warranty Act § 104(a)(4), 15 U.S.C.A. § 2304(a)(4) (Supp. 1, 1975).

63. *Id.*

64. The proposed rule on warranty disclosure would require the warrantor to specify the period of time within which, after notification of the defect, remedial action will be forthcoming. 40 Fed. Reg. 29,893 (July 16, 1975).

65. Since section 111(b)(1) preserves the consumer's rights and remedies under state law, the notification should in any case be given as soon as possible after discovery of the defect or nonconformity in order to comply with UCC § 2-607(3)(a), thereby safeguarding the consumer's right to damages under UCC § 2-714.

66. Senate Report, *supra* note 11, at 25.

67. The House-Senate Conferees indicated that cost and inconvenience to the consumer are to be weighed against the resulting benefits to the warrantor in deciding the reasonableness of the obligation. *Id.*

68. Warranty Act § 104(b)(2), 15 U.S.C.A. § 2304(b)(2) (Supp. 1, 1975).

sumer return the product to the place of purchase.⁶⁹ Since section 104(b)(1) would not be applicable, such a requirement would not be subject to that section's reasonableness standard. Perhaps the obligation described in paragraph (b)(2) should not be read as including the physical delivery of the product to a particular location, but rather as simply requiring the consumer to furnish clear legal title. Any requirement concerning the actual delivery of the product would then be subject to the reasonableness standard of section 104(b)(1).

The remedial obligations imposed upon warrantors by sections 104(a)(1) and (a)(4) are to be performed "without charge" to the consumer. This term is defined in subsection (d). The warrantor is not permitted to seek reimbursement for any cost incurred in connection with the required remedy. The section 104(a)(1)⁷⁰ obligation to remedy without charge does not require the warrantor to pay for incidental expenses incurred by the consumer.⁷¹ However, if the warrantor fails to provide a remedy within a reasonable time, or imposes an unreasonable duty upon the consumer in violation of subsection (b), the consumer's incidental expenses are recoverable.⁷²

Section 107 permits the warrantor to designate a representative to perform the remedial duties imposed by section 104(a), as well as all other obligations arising under a written or implied warranty. Nevertheless, the warrantor himself remains responsible to the consumer for the proper performance of these obligations.⁷³

In addition to the minimum remedial standards established by sections 104(a)(1) and (a)(4), the content of "full" warranties is further regulated by paragraphs (a)(2) and (a)(3). Section 104(a)(2) operates in conjunction with section 108 to prohibit any disclaimer or modification of implied warranties, including limitations as to duration, whenever a "full" written warranty is given. Section 104(a)(3) requires that any limitation or exclusion of consequential damages resulting from a breach of either a written or implied warranty must conspicuously⁷⁴

69. See House Report, *supra* note 4, at 38.

70. Section 104(d) refers to "subsection (a)(1)(A)," which, alas, does not exist. The reference is probably to section 104(a)(1), and possibly to section 104(a)(4) as well.

71. The warrantor may, of course, go beyond the minimum requirements of section 104 and undertake such an obligation in his warranty.

72. Warranty Act § 104(d), 15 U.S.C.A. § 2304(d) (Supp. 1, 1975).

73. Section 107 also provides that the warrantor "shall make reasonable arrangements for compensation of such designated representatives." The draftsmen did not intend that such compensation necessarily take the form of cash payments. In the case of a retailer who is designated by a manufacturer, the compensation may be in the form of an increased margin between the wholesale and retail prices. Senate Report, *supra* note 11, at 28.

74. UCC § 2-719(3), which deals with the limitations or exclusion of consequential damages, does not explicitly require such conspicuousness. The Proposed Rule on Warranty Disclosures would

appear on the face of any "full" warranty.⁷⁵ Section 111(b) preserves the consumer's rights and remedies under state law and also provides that the Act shall not supersede state requirements concerning consequential damages. UCC section 2-719(3) permits the exclusion or limitation of consequential damages only where such action is not unconscionable. In the case of consumer products, limitation of consequential damages for injury to the person is *prima facie* unconscionable. Thus, a warrantor offering a "full" warranty must also comply with UCC section 2-719(3) in order to effectively limit his liability for consequential damages.

Section 104 does more than define the nature of the obligations associated with "full" warranties—it governs the range of those obligations as well. Section 104(b)(4) declares that the duties imposed upon warrantors by subsection (a) shall extend to all persons who are "consumers" with respect to the particular product. The term "consumer" is defined in section 101(3), and includes not only the original buyer, but also any person to whom the product is transferred, and any person who is entitled by the terms of the warranty itself or by state law to enforce the warrantor's obligations. As a result, the duty to remedy created by section 104(a)(1) extends to all subsequent transferees of the product. Both the original buyer and later transferees may demand that the warrantor remedy any defect or nonconformity or be liable for damages for breach of warranty under either section 110(d) or UCC section 2-714.⁷⁶ In an action for breach of warranty the consumer could recover the economic loss resulting from the decreased value of the unrepaired product.⁷⁷ Consequential damages resulting from injury to personal property, however, would not necessarily be recoverable. By virtue of section 111(b), the recovery of these damages is controlled by state law. Therefore, a transferee who seeks to recover such damages resulting from a failure to remedy as required by section 104(a)(1) must satisfy any common law or UCC section 2-318 privity requirements,⁷⁸ or

require that such a limitation or exclusion be printed in large type, capital letters, or underlined. 40 Fed. Reg. 29,893 (July 16, 1975).

75. The FTC has said that it will interpret the section 110 prohibition against "deceptive" warranties as requiring that such limitations or exclusions of consequential damages also conspicuously appear when used in connection with "limited" warranties. 40 Fed. Reg. 25,723 (June 18, 1975).

76. Section 110(d) gives consumers a cause of action for breach of warranty for failure to comply with any obligation imposed by the Act. Alternatively, since the duties set forth in section 104 are incorporated in "full" warranties for purposes of state law as well, a suit for breach of warranty under the UCC could be initiated.

77. This type of economic harm is often referred to as a "loss of the bargain." W. Prosser, Torts § 101, at 666-67 (4th ed. 1971); J. White & R. Summers, Uniform Commercial Code 333-35 (1972).

78. See *Autrey v. Chemtrust Indus. Corp.*, 362 F. Supp. 1085, 1091-92 (D. Del. 1973).

rely on a theory of strict liability in tort.⁷⁹ In addition section 104(b)(4) would also permit a transferee to attempt to overcome a limitation or exclusion of consequential damages contained in a "full" warranty on the basis of noncompliance with section 104(a)(3).

The extension of the warrantor's obligations by section 104(b)(4) has even greater significance with respect to the other two duties imposed by subsection (a). Section 111(b)(2), which restricts the effect of the Act in the areas of liability for personal injury and consequential damages, specifically excludes sections 104(a)(2) and (4) from its operation. Thus, if a warrantor fails to permit a consumer to elect a refund or replacement when prior repairs have proven unsuccessful, as required by section 104(a)(4), a transferee may recover any resulting damages flowing from injury to person or property in an action under section 110(d) without becoming entangled in state law questions of privity or strict tort liability. In addition, the consumer can of course recover the economic loss arising from the reduced value of the unrepairable product. Finally, the obligation under section 104(a)(2) to forego the imposition of any limitation on the duration of implied warranties is also extended by section 104(b)(4) to benefit transferees. As with section 104(a)(4), paragraph (a)(2) is excluded from the limiting language in section 111(b)(2), and violations may therefore give rise to liability for personal injury and consequential damages irrespective of state law.

The substantive regulation of written warranties is not confined to the minimum standards set forth in section 104. It is section 108 which most significantly restricts the permissible content of written warranties. Section 108 deals with an aspect of consumer product warranties that attracted particular attention from the Task Force on Appliance Warranties and Service⁸⁰—the disclaiming of the implied warranties of merchantability and fitness. The practice of using a written warranty as a vehicle for the disclaimer of all implied warranties is particularly unfortunate. Almost without exception the buyer will believe that he is receiving protection beyond that which would be his in the absence of the written warranty. He will often in fact have fewer rights as a result of his dubious acquisition. "The bold print giveth and the fine print taketh away."⁸¹ More precisely, the bold print giveth and the fine print taketh away even more. A written warranty can be worse than useless where it reduces the rights and remedies available to the consumer. Section 108 is designed to eliminate this practice of disclaiming implied warranties by means of express written

79. See *Ciampichini v. Ring Bros.*, 40 App. Div. 289, 339 N.Y.S.2d 716 (4th Dep't 1973).

80. See note 6 *supra* and accompanying text.

81. House Report, *supra* note 4, at 24.

warranties.⁸² Subsection (a) prohibits a supplier from disclaiming or modifying any implied warranty whenever the supplier either offers a written warranty or enters into a service contract with the consumer within ninety days of the sale.⁸³ Unlike the requirements of section 104, this restriction extends to both "full" and "limited" warranties. Section 108 significantly curtails the warrantor's right under UCC section 2-316 to disclaim the implied warranties that arise under UCC sections 2-314 and 2-315. A seller may, of course, disclaim or modify the implied warranties whenever no written warranty is offered.⁸⁴ Similarly, section 108(a) does not prevent a seller from excluding all implied warranties by means of an "as is" or "with all faults" sale, since no written warranty would accompany such a purchase.⁸⁵ In the case of the "as is" sale, or where a disclaimer is given in the absence of a written warranty, the limitations on the seller's obligations can easily be recognized and evaluated accordingly. Even if the buyer does not fully understand how his rights are affected by the disclaimer, he will surely appreciate the fact that something is being taken away from him. When the disclaimer is contained within a written warranty, the potential buyer may believe that the warranty enhances his position and thus count it as an advantage when deciding whether to purchase. Even if he carefully reads the language of the warranty he may incorrectly believe that on the whole the warranty increases his protection. The rights conferred upon him by the written warranty are boldly spelled out, while those being withdrawn are hidden within such legalistic terms as "merchantability" and "implied warranty."

It should be emphasized that section 108(a) was evidently not intended to restrict a warrantor's right to limit or exclude liability for consequential damages arising from breach of an implied warranty, even when a written warranty is given. The subsection prohibits only disclaimers or modifications of the implied warranties themselves, not

82. Disclaimer of implied warranties under state law is governed by UCC § 2-316. Several states, however, have enacted non-uniform provisions which restrict the right of a seller to disclaim or modify implied warranties when the sale involves consumer goods. E.g., Ala. Code tit. 7A, § 2-316(5) (1966); Cal. Civ. Code Ann. §§ 1790-95 (1973); Me. Rev. Stat. Ann. tit. 11, § 2-316(5) (Supp. 1974); Md. Ann. Code art. 95B, § 2-316A (Supp. 1974); Mass. Ann. Laws ch. 106, § 2-316A (Supp. 1975); Ore. Rev. Stat. ch. 72, §§ 72.8010-.8200 (1974); Vt. Stat. Ann. tit. 9A, § 2-316(5) (Supp. 1975); Wash. Rev. Code Ann. § 62A.2-316(4) (Supp. 1974); W. Va. Code ch. 46A, § 46A-6-107 (Supp. 1974).

83. This section is addressed to "suppliers" and not "warrantors." As previously discussed, the former term may be narrower in scope than the latter. See notes 17-23 *supra* and accompanying text.

84. The seller may, however, be limited by other provisions of state law. See note 82 *supra* and accompanying text.

85. 120 Cong. Rec. 21,977 (daily ed. Dec. 18, 1974) (remarks of Senator Magnuson); see UCC § 2-316(3)(a).

limitations on the warrantor's liability for damages resulting from breach of such warranties. Even a warrantor offering a "full" written warranty is specifically permitted by section 104(a)(3) to exclude or limit his liability for consequential damages growing out of a breach of an implied warranty, provided the limitation is conspicuous.

Section 108(b) establishes a single exception to the general prohibition against disclaimers or modifications set forth in subsection (a). A warrantor offering a "limited" warranty may confine the duration of his implied warranties to that of the written warranty. Several restrictions are imposed in connection with this concession. The duration must be reasonable, not unconscionable, and be set forth in clear language prominently displayed. No such exception is permitted in the case of "full" written warranties. The language of section 108(b) does not indicate whether compliance with the conditions set out in that subsection alone is sufficient to limit successfully the duration of the implied warranties, or whether these requirements are intended to supplement those imposed by state law. More specifically, UCC section 2-316(2) requires that language modifying an implied warranty be conspicuous, and also requires, with respect to the implied warranty of merchantability, that the word "merchantability" specifically be used. One could argue that compliance with only the federal requirements would be sufficient for purposes of the Act.⁸⁶ The question is not likely to arise, however, because section 111(b)(1) preserves the consumer's rights and remedies under state law.⁸⁷

Under subsection (c), disclaimers or modifications of implied warranties made in violation of section 108 are ineffective for purposes of both the Act and state law. Thus, when a written warranty is given, the consumer may ignore any disclaimer or modification (other than a limitation of duration in compliance with subsection (b)) and maintain an action for breach of an implied warranty under either state law or section 110(d). Since section 108 is specifically excluded from the operation of section 111(b)(2), the consumer may recover damages for personal injury and other consequential damages without regard to state law.

One final provision should be included in this survey of sections dealing with the substantive content of written warranties. Section 102(c) provides that a warrantor may not tie a written or implied

86. The opening phrase of section 108(b) ("[f]or purposes of this title") would appear to support the conclusion that the federal requirements are intended as the exclusive criteria for modification when the propriety of such a limitation in duration is raised in an action under the Act.

87. Both the state and federal requirements for modification of implied warranties should be met in order to insure that the limitation on duration is effective.

warranty to the use of particular support products or services, unless permission to do so is first obtained from the FTC.⁸⁸ The only exception to this rule concerns support products or services which the warrantor offers without charge. The draftsmen wisely provided for public comment on all applications for waiver of this tying restriction. Participation by manufacturers of competing support products will no doubt be an effective check on the proliferation of such exemptions. It should be noted that the subsection applies to both "full" and "limited" warranties, as well as to any implied warranty, on consumer products costing more than five dollars.⁸⁹

V. REMEDIES—SECTIONS 110 AND 111

The Task Force on Appliance Warranties concluded that practical means of enforcing warranty obligations were not available to most consumers.⁹⁰ Regulation of disclosure and content would be of little value in the absence of the remedial procedures of section 110.⁹¹ The section is broad in scope and the procedural machinery it creates may be used to enforce both the innovative regulations contained in the Act, as well as all other obligations arising under a written or implied warranty. The remedial procedures of section 110 may prove even more significant than the Act's substantive regulations.

Congress, cognizant of the great volume of consumer product transactions,⁹² realized that the ultimate solution to the enforcement problems associated with consumer product warranties would not be found wholly within the overtaxed federal and state judicial systems. It placed primary emphasis on informal settlement procedures. The objective was to minimize expenditure of time and money while adequately insuring the fundamental fairness of the decision-making process. The FTC is ordered to prescribe rules establishing minimum standards for informal settlement mechanisms,⁹³ and is given the authority in section 110(a)(4) to review all such informal procedures in light of its promulgated regulations.⁹⁴ Although the impetus for review

88. The tying of service and support products may also constitute a violation of the antitrust laws. See *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970) (manufacturer's service contract obligations tied to use of its copying supplies).

89. Warranty Act § 102(e), 15 U.S.C.A. § 2302(e) (Supp. 1, 1975).

90. House Report, *supra* note 4, at 27.

91. Warranty Act § 110, 15 U.S.C.A. § 2310 (Supp. 1, 1975).

92. See House Report, *supra* note 4, at 22-23.

93. Warranty Act § 110(a)(2), 15 U.S.C.A. § 2310(a)(2) (Supp. 1, 1975).

94. The Commission's Proposed Minimum Standards Rule would prohibit any party to a dispute, or any employee or agent of any party, from acting as a decision-maker in any informal mechanism. If the dispute is to be decided by less than three persons, none may be involved in

may arise from within the Commission, the FTC is also obligated to undertake a review upon the filing of a written complaint by any interested party. Whether Commission resources are inadequate to undertake such an obligation is uncertain.⁹⁵ Participation by independent or governmental entities in the informal decision-making process is required. These may include agencies on the state or local level or small claims courts.⁹⁶ Informal settlement mechanisms may be established by a single warrantor to serve his own needs, or may involve more extensive, even industry-wide, participation.⁹⁷

The congressional policy embodied in section 110 is one of encouragement rather than coercion. No warrantor is compelled to institute or participate in any informal settlement mechanism. Before dismissing the possibility, however, the warrantor should consider the impact of section 110(d)(2), which permits a court to award costs and expenses, *including attorneys' fees*, if the consumer prevails in a formal judicial proceeding. Warrantors who do not wish to risk imposition of such costs may find that inexpensive, informal procedures can offer benefits to both parties.

A warrantor may compel initial resort to an informal settlement mechanism which satisfies FTC rules by simply incorporating such a requirement into the written warranty. It is not clear whether the

the manufacture, distribution or sale of any product; if three or more persons will participate in the decision, at least two-thirds must have no such involvement. The informal mechanism must have written operating procedures, and must be provided to the consumer free of charge. If contradictory information is submitted to the settlement body, both parties must be notified and given an opportunity to rebut or explain such information, or to submit additional materials. Oral presentations are permitted only if both parties agree, and the consumer must be informed of this fact before his consent is obtained. A decision must be made within forty days of the notification of the dispute unless the delay is due solely to the consumer. If the delay is not the fault of the consumer, the requirement of initial resort to the mechanism is satisfied after this forty day period, even if no decision has been rendered. The decision may provide for any remedy available under either the written warranty or the Act, and must specify a reasonable time for compliance. The decision, together with supporting reasons and the warrantor's intentions, must be reported to the consumer. The consumer must also be informed of his right to pursue legal remedies if he remains dissatisfied. If the warrantor has agreed to take action in accordance with any informal decision, the mechanism must ascertain within five working days of the date specified for performance whether the warrantor has in fact complied. Records must be maintained and statistics must be compiled reflecting the disposition of all cases. The records relating to a particular dispute must be available to both parties, and the statistical data must be open to the public. All records must also be available to the FTC, and there must be an annual independent audit of the operations. The report of the auditors must be sent to the Commission and made available to the public. 40 Fed. Reg. 29,896-99 (July 16, 1975).

95. The limited resources of the Commission were evidently a factor in prompting the Congress to permit direct judicial as well as administrative review of the adequacy of informal procedures. Senate Report, *supra* note 11, at 26.

96. *Id.*

97. 40 Fed. Reg. 29,896 (July 16, 1975).

warrantor must spell out the exact details of the procedure, or may simply state that resort to an established settlement mechanism is required.⁹⁸ This may be one of the few instances in which the Commission's authority to devise "canned" warranty provisions might profitably be employed.⁹⁹ The details of model settlement mechanisms could be spelled out by the FTC, and warrantors could then incorporate these provisions by reference. Incorporation by reference would be less objectionable here than in connection with other types of "canned" provisions, since the consumer need not be overly concerned with the precise details of the informal procedure in view of the fact that the Commission itself is charged with insuring its fairness.

Section 110(a)(3) prohibits a consumer from bringing a prior civil action under subsection (d) if the warrantor has established an informal settlement mechanism and required initial resort to it.¹⁰⁰ Since section 111(b)(1) preserves the consumer's rights and remedies under state law, he is not prohibited from commencing a civil action for breach of warranty under the UCC whether or not the dispute has been submitted for informal settlement.¹⁰¹ Consumer class actions are accorded special treatment. Such actions may be commenced under section 110(d) regardless of the existence of an informal settlement mechanism, but may not proceed beyond a determination of the representative capacity of the named plaintiffs in accordance with rule 23(a) of the Federal Rules of Civil Procedure. The rationale for this exception is obvious. Until a determination as to representative capacity has been made, no one can legitimately submit to an informal mechanism on behalf of the entire class. If all potential class members were required to participate individually in the informal procedure, the result would be

98. The Commission's Proposed Minimum Standards Rule would require the disclosure of the availability of the informal mechanism, the name, address or telephone number used to initiate proceedings, a statement compelling initial resort to the procedure if the consumer so desires, and a disclosure that initial resort cannot be required when the rights and remedies being pursued do not arise under the Act. In addition, any time limitations imposed by the procedure and the type of information which may be requested must also be disclosed. The actual working details of the procedure need not be set forth in the warranty or accompanying materials, but must be available on demand, and in any case must be sent automatically to any consumer involved in a dispute. 40 Fed. Reg. 29,896-97 (July 16, 1975).

99. See note 38 *supra* and accompanying text.

100. This applies to all civil actions brought under section 110(d), whether in federal or state court.

101. 120 Cong. Rec. 21,977 (daily ed. Dec. 18, 1974) (remarks of Senator Moss). Of course, if the controlling state law required exhaustion of alternative procedures, the consumer would still be compelled to submit to the informal mechanism before pursuing a civil action. *Id.* The proposed minimum standards rule would require that a warranty containing a provision compelling initial resort to an informal mechanism also contain a statement that the consumer may pursue remedies not created by the Act without initially resorting to the procedure. See note 98 *supra*.

the same type of waste and duplication at the informal level that the class action device is designed to eliminate at the judicial level. In essence, section 110(a)(3) simply extends the concept of the class action into the area of informal settlement.

A requirement that the consumer initially resort to an informal settlement mechanism can provide one of the methods through which judicial review of the adequacy of the informal procedure can be obtained. Since resort to such a procedure can be required only when it complies with established FTC rules, the consumer may choose to institute a civil action immediately and argue that the mechanism does not in fact meet the Commission's requirements. If the court agrees, the consumer will be permitted to maintain his action. The burden of proving compliance would fall on the warrantor since he would be the party seeking to invoke the section 110(a)(3) exhaustion requirement.¹⁰² The consumer is evidently not obligated to demand a prior FTC review of the procedure under section 110(a)(4) before presenting the question to the court.¹⁰³

An adverse decision arising from an informal proceeding does not bar the consumer from instituting a later civil action. The results of the informal mechanism, however, are admissible in any later action, whether brought under section 110(d) or under the UCC.¹⁰⁴ Presumably the consumer could move to exclude the earlier decision on the grounds that the proceeding did not comply with FTC rules, thus providing another mechanism for judicial scrutiny of informal procedures.¹⁰⁵

Section 110(d) provides for the recovery of damages resulting from either a failure to comply with the Act itself, or from a failure to perform any obligation arising under a written warranty, implied warranty or service contract. Thus the subsection not only provides a means of enforcing the disclosure and content regulations contained in the Act, but also establishes a federal cause of action for breach of warranty. Even a warrantor offering no written warranty at all is subject to suit under subsection (d) if he should breach an implied warranty which has arisen under state law.¹⁰⁶ Only obligations found on oral warranties are excluded from the scope of section 110(d). The subsection does not specify the nature of the damages which the

102. Senate Report, *supra* note 11, at 26-27.

103. *Id.*

104. 40 Fed. Reg. 29,898 (July 16, 1975).

105. House Report, *supra* note 4, at 41; 120 Cong. Rec. 21,977 (daily ed. Dec. 18, 1974) (remarks of Senator Moss).

106. The term "warrantor" includes those liable under implied as well as written warranties. Warranty Act § 101(5), 15 U.S.C.A. § 2301(5) (Supp. 1, 1975). The existence of implied warranties is determined by state law. *Id.* § 101(7), 15 U.S.C.A. § 2301(7) (Supp. 1, 1975).

consumer may recover in a section 110(d) action. Presumably the consumer may seek all damages resulting from the warrantor's failure to comply with either the Act itself or with a written or implied warranty, including damages relating to personal injury and other consequential damages.¹⁰⁷ However, the warrantor's liability for these latter damages will ordinarily be determined by state law in accordance with section 111(b)(2).

An action under subsection (d) may be brought in either state or federal court. In view of the federal jurisdictional requirements in section 110(d)(3), the great bulk of such actions will undoubtedly be heard in state courts.¹⁰⁸ In order to establish federal jurisdiction each individual claim must be at least twenty-five dollars and the entire amount in controversy must be \$50,000, and, if the action is a class action, the number of named plaintiffs must be at least one hundred. The three requirements are independent—all must be met in order to establish jurisdiction.¹⁰⁹ It should be noted that the third requirement refers to the number of *named* plaintiffs rather than to the size of the class itself.¹¹⁰

Before a consumer may commence an action under subsection (d) based upon an alleged failure to comply with any obligation arising under a written or implied warranty, section 110(e) requires that the warrantor be afforded an opportunity to cure.¹¹¹ In the case of a class action, the action may not proceed beyond a determination of the representative capacity of the named plaintiffs until such plaintiffs,

107. The jurisdictional requirements in section 110(d)(3) lend support to the argument that damages due to personal injury and other consequential damages are recoverable in an action under subsection (d). Section 110(d)(3)(B) states that the amount in controversy must equal at least \$50,000 in order to bring suit in federal court, and the language of subsection (d)(3)(C) indicates that the draftsmen did not believe that all such suits would be class actions. If the damages recoverable in a section 110(d) action were limited to the loss of the bargain, no individual claim would be likely to approach the \$50,000 figure.

108. The Report of the Senate Commerce Committee states: "Thus, for the most part, the Federal rights created by title I of this bill will be enforced in State rather than Federal courts." S. Rep. No. 151, 93d Cong., 1st Sess. 23 (1974).

109. See Senate Report, *supra* note 11, at 27; House Report, *supra* note 4, at 42.

110. The draftsmen may have felt that individual consumers might attempt to use the liberal federal class action rule (Fed. R. Civ. P. 23) in an effort to obtain increased settlement leverage. By requiring a large number of named plaintiffs, the draftsmen were perhaps attempting to shield warrantors from the threat of class actions made by isolated consumers. Query, however, whether the requirement is so severe as to reduce greatly the benefits offered by the class action mechanism.

111. This requirement pertains only to actions based upon a failure to comply with warranty obligations, and not to actions founded upon a failure to comply with the provisions of the Act, though both types of actions are permitted by subsection (d). Since the latter would most likely involve violations of warranty content or disclosure requirements, as opposed to product nonconformity, an opportunity to cure would not be particularly meaningful.

acting on behalf of the class, likewise offer the warrantor an opportunity to cure. The section 110(e) requirement does not apply, however, if the consumer has previously been forced to submit the dispute to an informal settlement mechanism, since the informal procedure itself offers the warrantor an opportunity to avoid suit by taking corrective action.

The effect of section 110(f) is not entirely apparent. The subsection states that only those warrantors "actually making" written affirmations or promises shall be deemed to have created a written warranty. Unfortunately, the term "actually making" is left undefined. At a minimum the term would appear to exclude newspapers, magazines, and radio or television stations which merely advertise a warranty on behalf of another.¹¹² It would also appear to prohibit a suit under section 110(d) against a designated service representative. This view is supported by section 107 which specifically states that such a representative does not become a co-warrantor. But does section 110(f) reach beyond these examples? Is a retailer "actually making" an affirmation or promise when he sells a product upon which the manufacturer has fastened a written warranty? Before concluding that the term is intended to exclude such persons, however, the language of the House-Senate Conference Committee Report should be considered. The report states:

[I]f under State law a warrantor or other person is deemed to have made a written affirmation of fact, promise, or undertaking he would be treated for purposes of section 110 as having made such affirmation of fact, promise, or undertaking.¹¹³

Thus, if under state law a retailer is liable on the written warranty created by his manufacturer, he may be subject to suit under section 110(d) if he fails to comply with any warranty obligation.¹¹⁴

The requirements of the Magnuson-Moss Warranty Act are not tied exclusively to private enforcement. Under section 110(b), a failure to comply with the requirements of the new statute constitutes a violation of section 5(a)(1) of the Federal Trade Commission Act.¹¹⁵ This device

112. See Senate Report, *supra* note 11, at 27.

113. *Id.*

114. The accepted rule is that a seller is not liable on the express warranty of the manufacturer unless he somehow "adopts" it as his own. *E.g.*, *Wallace v. McCampbell*, 178 Tenn. 224, 156 S.W.2d 442 (1941) (merchant did not adopt manufacturer's alleged warranty by merely delivering a letter in which it was described); *Cochran v. McDonald*, 23 Wash.2d 348, 161 P.2d 305 (1945) (mere selling of product held not sufficient to show adoption of manufacturer's warranty by seller); see *Scovil v. Chilcoat*, 424 P.2d 87 (Okla. 1967) (affirmation or promise by seller which relates to manufacturer's warranty constitutes an adoption). This general rule, however, has not been without criticism. R. Duesenberg & L. King, *Sales and Bulk Transfers Under the UCC* § 6.08(2) (1975); 2 L. Frumer & M. Friedman, *Products Liability* § 19.04(6) (1975).

115. 15 U.S.C.A. § 45(a)(1) (Supp. 1, 1975). This section states: "Unfair methods of competi-

gives the FTC the power to issue cease and desist orders in connection with such violations. In addition, section 110(c) grants to both the Commission and the Department of Justice the power to seek injunctive relief in federal court. In a proper case, temporary restraining orders and preliminary injunctions may be issued. If the action is brought by the Commission, the restraining order or preliminary injunction will be dissolved if a complaint is not filed under section 5 of the Federal Trade Commission Act within ten days or such shorter period as the court may specify. An injunction may be directed at a warrantor who offers a "deceptive warranty," or who fails to comply with any obligation imposed by the Act. The term "deceptive warranty" is defined in section 110(c)(2) of the Warranty Act as one which contains a false or misleading representation, or fails to disclose information necessary to prevent the warranty from being misleading.¹¹⁶ A warranty is also "deceptive" if it is so limited in scope as to be in reality no warranty at all. In connection with the first portion of the definition the draftsmen chose as the standard a "reasonable individual exercising due care." As to the latter portion, however, the standard is based simply on a "reasonable individual," the "due care" language having been omitted. Whatever the legislative intent, the standards will almost certainly be indistinguishable in practice.¹¹⁷

The Congress was well aware that it faced something less than a clean slate when it confronted the problems of consumer product warranties. Section 111 attempts to delineate the extent to which the Act affects the complex pattern of existing state and federal law. Subsection (c), which relates to state disclosure and labeling requirements, and the interpretive problems which it generates, has already been discussed in connection with section 102. As previously noted, section 111(b)(1) preserves private rights and remedies under state and other federal law. The consumer is thus free to ignore the Act and seek redress through more traditional avenues such as breach of warranty, fraud, or rescission.¹¹⁸ The deference paid by section 111(b)(2)

tion in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

116. The FTC will evidently treat any written warranty which contains a disclaimer, exclusion or limitation which is in violation of the Act as a "deceptive warranty" under section 110(c), presumably because such a provision may induce the consumer to forego recourse to the warranty in situations where he may in fact have enforceable legal rights. 40 Fed. Reg. 25,723 (June 18, 1975).

117. Sections 102(a)(13) and 102(b)(1)(B), which are intended to prevent deception arising through inadequate disclosure, employ the standard of a "reasonable, average consumer." The distinction between this standard and that established by section 110(c)(2) is left to the inventive skill of the reader.

118. Section 111(b)(1) would also preserve consumer remedies under federal statutes such as the Consumer Product Safety Act, 15 U.S.C. §§ 2051-81 (Supp. II, 1972).

to state laws regulating liability for personal injury and consequential damages has also been considered. In addition, section 111(a) serves as a reminder that section 5 of the Federal Trade Commission Act continues to apply to practices associated with consumer product warranties whether or not they are covered by the Magnuson-Moss Warranty Act. Thus warranties which are not within the scope of the Act remain within the mandate of the FTC.¹¹⁹ Finally, with the exception of the section 102(c) tying prohibition, section 111(d) renders the Act inapplicable to written warranties otherwise governed by federal law, such as section 207 of the Clean Air Act,¹²⁰ which pertains to warranties on motor vehicles.

VI. CONCLUSION

The degree to which the Magnuson-Moss Warranty Act will be successful in eliminating the abuses documented by the Task Force on Appliance Warranties and Service is uncertain. The exact scope of the Act is vague and ill-defined, and its relationship to existing state law remains perplexing despite protracted efforts at explication. In view of the extended consideration afforded by Congress, the number of ambiguities and apparent inconsistencies is surprising. In addition, since the Act does not compel the use of written warranties or require that all those offered meet the "full" warranty standards of section 104, the whole enterprise must rely heavily upon competitive pressure. Success is possible only if economic forces are sufficient both to dissuade manufacturers and retailers from reducing their use of written warranties in the face of tightened controls and to spur the abandonment of "limited" warranties in favor of the more extensive "full" warranty coverage. In the end, however, the combination of toughened disclosure standards, increased regulation of warranty content, and improved remedial mechanisms may adequately overcome the shortcomings of the Act and thus at least partially reduce the incidence of unfairness and deception arising in connection with the use of consumer product warranties.

119. This would include, for example, warranties on products costing less than five dollars. S. Rep. No. 151, 93d Cong., 1st Sess. 25 (1974).

120. 42 U.S.C. § 1857(f)-5(a) (1970).